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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA-2014-0225; Amdt. No. 91-331D]

RIN 2120-AK92

Extension of the Prohibition Against Certain Flights in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) Flight Information Regions (FIRs)

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This action extends the prohibition against certain flight operations in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) flight information regions (FIRs) by all United States (U.S.) air carriers; U.S. commercial operators; persons exercising the privileges of a U.S. airman certificate, except when such persons are operating a U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when such operators are foreign air carriers. The FAA finds this action to be necessary to address a continuing hazard to persons and aircraft engaged in such flight operations.

DATES: This final rule is effective on October 27, 2016.

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SUPPLEMENTARY INFORMATION:

I. Executive Summary

This action continues the prohibition on flight operations in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs by all U.S. air carriers; U.S. commercial operators; persons exercising the privileges of a U.S. airman certificate, except when such persons are operating a U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when such operators are foreign air carriers. The FAA finds this action necessary to address a continuing hazard to persons and aircraft engaged in such flight operations.

II. Legal Authority And Good Cause

A. Authority for this Rulemaking

The FAA is responsible for the safety of flight in the U.S. and for the safety of U.S. civil operators, U.S.-registered civil aircraft, and U.S.-certificated airmen throughout the world. The FAA's authority to issue rules on aviation safety is found in title 49, U.S. Code. Subtitle I, section 106(f), describes the authority of the FAA Administrator. Section 40101(d)(1) provides that the Administrator shall consider in the public interest, among other matters, assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. Section 40105(b)(1)(A) requires the Administrator to exercise his authority consistently with the obligations of the U.S. Government under international agreements.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, subpart III, section 44701, General requirements. Under that section, the FAA is charged broadly with promoting safe flight of civil aircraft in air commerce by prescribing, among other things,

regulations and minimum standards for practices, methods, and procedures that the Administrator finds necessary for safety in air commerce and national security. This regulation is within the scope of that authority because it continues to prohibit the persons subject to paragraph (a) of Special Federal Aviation Regulation (SFAR) No. 113, § 91.1607, from conducting flight operations in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs due to the hazard to the safety of such persons' flight operations, as described in the Background section of this rule.

B. Good Cause for Immediate Adoption

Section 553(b)(3)(B) of title 5, U.S. Code, authorizes agencies to dispense with notice and comment procedures for rules when the agency for “good cause” finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” In this instance, the FAA finds that notice and public comment to this immediately adopted final rule, as well as any delay in the effective date of this rule, are contrary to the public interest due to the immediate need to address the continuing hazard to civil aviation that exists in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs, as described in the Background section of this final rule.

III. Background

The threat to safety in existence when the FAA first published SFAR No. 113, § 91.1607 on April 25, 2014 (79 FR 22862) has not abated. At that time, the FAA viewed the possibility of civil aircraft receiving confusing and conflicting air traffic control instructions from both Ukrainian and Russian air traffic service providers when operating in the portion of the Simferopol (UKFV) FIR covered by SFAR No. 113, § 91.1607, as an unsafe condition that presented a potential hazard to U.S. civil flight operations in the disputed airspace. Because political and military tensions between Ukraine and the Russian Federation remained high, the FAA was also concerned that compliance with air traffic control instructions issued by the authorities of one country could result in a civil aircraft being misidentified as a threat and intercepted or otherwise engaged by air defense forces of the other country. The FAA continues to have these concerns.

On July 18, 2014, the FAA issued a Notice to Airmen (NOTAM) FDC 4/2182, expanding the flight prohibition to the entire Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs, primarily as an immediate response to the shoot down of Malaysia Airlines MH17 on July 17, 2014, while flying over Ukraine at 33,000 feet just west of the Russian border. Two hundred ninety eight passengers and crew perished. In addition, there were other attacks on fixed-wing and rotary-wing Ukrainian military aircraft flying at lower altitudes, such as the shoot down of a Ukrainian An-26 flying at 21,000 feet southeast of Luhansk on July 14, 2014. As a result of these events, the FAA determined that the ongoing conflict in the region posed a significant threat to U.S. civil aviation operations in these FIRs. The use of weapons capable of targeting and shooting down aircraft flying on civil air routes at cruising altitudes posed a significantly

dangerous threat to civil aircraft flying in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs. The FAA published a final rule incorporating the expanded flight prohibition into SFAR No. 113, § 91.1607, on December 29, 2014 (79 FR 77857). The FAA extended this flight prohibition in a final rule published October 27, 2015 (80 FR 65621).

The State Aviation Administration of Ukraine conducted and completed an airspace restructuring that went into effect in the late 2014 timeframe. The new configuration altered both the Simferopol (UKFV) and Dnipropetrovsk (UKDV) Flight Information Region (FIR) altitude structures. To address the Ukraine airspace restructuring and provide additional clarity, on July 22, 2016, the FAA published a technical amendment to specifically identify the prohibited airspace in which SFAR No. 113, § 91.1607, applies, with inclusive altitudes and lateral limitations (latitude and longitude coordinates). 81 FR 47699.

The FAA has continued to evaluate the situation in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs and has determined there is a continuing significant flight safety hazard to U.S. civil aviation. Although the European Aviation Safety Agency's (EASA) published a Safety Information Bulletin (SIB) on February 17, 2016, indicating that ATS routes L851 and M856 could be considered for planning flights in the Simferopol (UKFV) FIR, there is continuing concern over the hazard to U.S. civil aviation from possible conflicting air traffic control instructions from Ukrainian and Russian air traffic service providers. Shortly following the EASA bulletin, the Russian Federal Air Transport Agency responded with a press release in which it again asserted that it was responsible for air traffic services in a portion of the Simferopol (UKFV) FIR. The Russian circular (from Feb 21, 2016) further stated, "The Russian Federation does not bear the responsibility for the provision of safety to those flights, which will be operated within Simferopol FIR under control of ATC unit other than Simferopol Air Traffic

Management Centre.” Russia contended that EASA’s decision was politically motivated and ‘pose[d] a threat to aviation safety in the region.’ In addition, there have been reported incidents of purposeful interference, including GPS jamming, in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs. Based on this information, the FAA continues to assess that there is a significant flight safety hazard to U.S. civil aviation in the Simferopol (UKFV) FIR.

In the Dnipropetrovsk (UKDV) FIR, there is an ongoing risk of skirmishes in the area and a potential for larger-scale fighting in eastern Ukraine involving combined Russian-separatist forces, which could result in civil aircraft being misidentified as a threat and then intercepted or otherwise engaged, as demonstrated by the shoot down of Malaysia Airlines Flight 17 on July 17, 2014. These combined forces have access to a variety of anti-aircraft weapons, to include man-portable air defense systems (MANPADS) and possibly more advanced surface-to-air-missiles (SAMs) that have the capability to engage aircraft at higher altitudes. Separatists have demonstrated their ability to use these anti-aircraft weapons by successfully shooting down a number of aircraft during the course of the fighting in eastern Ukraine in 2014. More recently, Organization for Security and Cooperation in Europe (OSCE) Special Monitoring Mission to Ukraine (SMM) unmanned aerial systems (UASs) also have been shot down by surface-to-air missiles and small arms ground fire, and brought down with GPS jamming in the Dnipropetrovsk (UKDV) FIR.

Due to the previously described continuing hazards to U.S. civil aviation operations, the FAA is extending the expiration date of SFAR No. 113, § 91.1607, to continue the prohibition on flight operations in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs by all U.S. air carriers; U.S. commercial operators; persons exercising the privileges of a U.S. airman certificate, except when such persons are operating a U.S.-registered aircraft for a foreign air

carrier; and operators of U.S.-registered civil aircraft, except when such operators are foreign air carriers. This rule extends the expiration date of SFAR No. 113, § 91.1607, from October 27, 2016, to October 27, 2018.

The FAA will continue to actively evaluate the area to determine to what extent U.S. civil aviation may be able to safely operate therein. Adjustments to this SFAR may be appropriate if the risk to aviation safety and security changes. The FAA may amend or rescind this SFAR as necessary prior to its expiration date.

Because the circumstances described herein warrant a continuation of the flight restrictions imposed by SFAR No. 113, I find that notice and public comment under 5 U.S.C. 553(b)(3)(B) are impracticable and contrary to the public interest. I also find that this action is fully consistent with the obligations under 49 U.S.C. 40105 to ensure that I exercise my duties consistently with the obligations of the United States under international agreements.

IV. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), as codified in 5 U.S.C. 603 *et seq.*, requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96-39), as amended, 19 U.S.C. Chapter 13, prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to

consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as codified in 2 U.S.C. Chapter 25, requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

In conducting these analyses, FAA has determined this final rule has benefits that justify its costs. This rule is a significant regulatory action as defined in section 3(f) of Executive Order 12866 or as defined in DOT's Regulatory Policies and Procedures, as it raises novel policy issues. This final rule merely extends an existing flight prohibition without change. This rule will not have a significant economic impact on a substantial number of small entities. This rule will not create unnecessary obstacles to the foreign commerce of the United States. This rule will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector by exceeding the threshold identified above.

DOT Order 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the costs and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows.

This rule extends the existing prohibition against U.S. civil flight operations in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs. As we noted in the most recent previous

amendment to SFAR No. 113, § 91.1607 (80 FR 65621, October 27, 2015), almost all U.S. operators already had voluntarily ceased their operations in these FIRs prior to the issuance of the FAA NOTAM on July 18, 2014 (UTC), which prohibited U.S. civil flight operations in these two FIRs in their entirety. Prior to the issuance of the July 18, 2014 (UTC) NOTAM, the FAA had already prohibited U.S. civil flight operations in a portion of the Simferopol (UKFV) FIR due to a dispute between Ukraine and the Russian Federation over which country is responsible for providing air navigation services in the area, first via NOTAM and subsequently when the FAA initially published SFAR No. 113, § 91.1607, on April 25, 2014. Consequently, no U.S. operators were operating in that portion of the Simferopol (UKFV) FIR at the time of the December 29, 2014 amendment to the rule.

Because of the continuing significant hazards to U.S. civil aviation discussed in the Background section of this final rule, the FAA believes that few, if any, U.S. operators presently wish to conduct operations in either of these two FIRs. Moreover, both the amendment published on December 29, 2014, and this rule, permit a U.S. Government department, agency, or instrumentality to request FAA approval on behalf of a person described in paragraph (a) of SFAR No. 113, § 91.1607, to conduct operations under a contract (or subcontract), grant, or cooperative agreement with that department, agency, or instrumentality. As no U.S. Government department, agency, or instrumentality has requested such approval since December 29, 2014, there is apparently little demand for such approvals. Finally, the possibility of obtaining an approval, should one be requested, lowers the expected cost of the extended rule. Accordingly, the FAA believes the incremental costs of this final rule will be minimal. These minimal costs will be exceeded by the benefits of avoiding the deaths, injuries, and/or property damage that

would result from a U.S. operator's aircraft being shot down (or otherwise damaged) while operating in either or both of the Simferopol (UKFV) and Dnipropetrovsk (UKDV) FIRs.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Public Law 96-354) (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.” The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis, as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

As described in the Regulatory Evaluation section of this preamble, the incremental costs of this rule are minimal. Therefore, as provided in § 605(b), the head of the FAA certifies that

this rulemaking will not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Public Law 96-39), as amended, prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to this Act, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the effect of this final rule and determined that its purpose is to protect the safety of U.S. civil aviation from a hazard outside the U.S. Therefore, the rule is in compliance with the Trade Agreements Act.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” The FAA currently uses an inflation-adjusted value of \$155.0 million in lieu of \$100 million.

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new requirement for information collection associated with this immediately adopted final rule.

F. International Compatibility and Cooperation

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to this regulation.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act (NEPA) in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 5-6.6f of this order and involves no extraordinary circumstances.

The FAA has reviewed the implementation of this SFAR and determined it is categorically excluded from further environmental review according to FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures,” paragraph 5-6.6f. The FAA has examined possible extraordinary circumstances and determined that no such circumstances exist. After

careful and thorough consideration of the action, the FAA finds that this Federal action does not require preparation of an Environmental Assessment or Environmental Impact Statement in accordance with the requirements of NEPA, Council on Environmental Quality (CEQ) regulations, and FAA Order 1050.1F.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this immediately adopted final rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined that this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have Federalism implications.

B. Executive Order 13211, Regulations that Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this immediately adopted final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it would not be a “significant energy action” under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

C. Executive Order 13609, Promoting International Regulatory Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, (77 FR 26413, May 4, 2012) promotes international regulatory cooperation to meet shared challenges involving

health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

VI. Additional Information

A. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the Internet by—

- Searching the Federal eRulemaking Portal (<http://www.regulations.gov>);
- Visiting the FAA’s Regulations and Policies web page at http://www.faa.gov/regulations_policies or
- Accessing the Government Publishing Office’s web page at <http://www.fdsys.gov>

Copies may also be obtained by sending a request (identified by docket or amendment number of the rule) to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267-9677.

Except for classified material, all documents the FAA considered in developing this rule, including economic analyses and technical reports, may be accessed from the Internet through the Federal eRulemaking Portal referenced above.

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this

document may contact its local FAA official, or the person listed under the FOR FURTHER INFORMATION CONTACT heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.

List of Subjects in 14 CFR part 91

Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Freight, Ukraine.

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations, as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 1155, 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, 47534, articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

2. Amend § 91.1607 by revising paragraph (e) to read as follows:

§ 91.1607 Special Federal Aviation Regulation No. 113—Prohibition Against Certain Flights in the Simferopol (UKFV) and Dnipropetrovsk (UKDV) Flight Information Regions (FIRs).

* * * * *

(e) Expiration. This SFAR will remain in effect until October 27, 2018. The FAA may amend, rescind, or extend this SFAR as necessary.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f), 40101(d)(1), 40105(b)(1)(A), and 44701(a)(5), on October 21, 2016.

Victoria B. Wassmer,
Acting Deputy Administrator.
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